

HOUSE BILL REPORT

HB 1382

As Reported by House Committee On:
Public Safety & Emergency Preparedness

Title: An act relating to expansion of the DNA identification system.

Brief Description: Expanding the DNA identification system.

Sponsors: Representatives Miloscia, Hurst, O'Brien and Kelley.

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 2/3/09, 2/18/09 [DPS].

Brief Summary of Substitute Bill

- Expands the deoxyribonucleic acid (DNA) identification system to include a profile from all adults lawfully arrested for a most serious offense, any sex offense, and certain misdemeanors.
- Requires the biological sample to be destroyed and the DNA profile to be removed from the system if the accused is not charged or is found not guilty, or if the underlying adjudication has been reversed and the case dismissed.
- Makes the duty to collect biological samples upon arrest contingent on receipt of federal funds.
- Designates the misuse or unauthorized retention of a biological sample or DNA profile an unranked class C felony.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Hurst, Chair; O'Brien, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Kirby and Ross.

Minority Report: Do not pass. Signed by 2 members: Representatives Appleton and Goodman.

Staff: Lara Zarowsky (786-7123)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

The Washington State Patrol (WSP) operates and maintains a deoxyribonucleic acid (DNA) identification system. The purpose of the system is to help with criminal investigations and to identify human remains or missing persons. County and city jails are responsible for collecting biological samples for DNA analysis from offenders incarcerated in their facilities. The Department of Corrections and the Department of Social and Health Services are responsible for collecting biological samples for DNA analysis from offenders incarcerated in their facilities. Local police and sheriff's departments are responsible for collecting biological samples for DNA analysis from offenders who do not serve a term of incarceration.

I. Offenders From Whom a Biological Sample Must be Collected.

Biological samples must be collected from any person convicted of a felony, sex and kidnapping offenders required to register on or after June 2008, and any person convicted of the following misdemeanors:

- assault in the fourth degree with sexual motivation;
- communicating with a minor for immoral purposes;
- custodial sexual misconduct in the second degree;
- failure to register;
- harassment;
- patronizing a prostitute;
- sexual misconduct with a minor in the second degree; and
- violation of a sexual assault protection order.

If a DNA sample already exists from the offender in question, another biological sample does not have to be collected.

II. Testing Biological Samples.

The Forensic Laboratory Services Bureau of the WSP is responsible for testing biological samples for inclusion in the DNA database. The Director of the Forensic Laboratory Services Bureau (Director) must give priority to testing samples from persons convicted of sex and violent offenses. Duplicate biological samples may be excluded from testing, unless the Director deems testing necessary or advisable.

III. Funding.

A court must levy a \$100 fee upon sentencing for any crime included in the database, regardless of when the crime was committed. The fee constitutes a legal financial obligation that must be paid after all other legal financial obligations included in the sentence have been satisfied. Eighty percent of this fee is deposited in the state DNA Database Account (Account) and 20 percent is transmitted to the agency responsible for collecting of a biological sample from the offender.

Summary of Substitute Bill:

I. Offenders For Whom a Biological Sample Must be Collected.

The DNA identification system is expanded to include a DNA profile for all adults lawfully arrested for the commission of any criminal offense constituting a most serious offense, any sex offense, or the following misdemeanor offenses:

- assault in the fourth degree with sexual motivation;
- communication with a minor for immoral purposes;
- harassment;
- patronizing a prostitute;
- stalking; and
- violation of a sexual assault protection order.

Beginning January 1, 2010, local law enforcement agencies must start collecting biological samples from arrested persons. The samples must be forwarded to the WSP for analysis. This requirement does not apply unless: (1) federal funding is provided to the state to reimburse local governments and the WSP for the cost of biological sample collection and testing; and (2) the Chief of the WSP notifies the chief law enforcement officer of each county, city, and town that funds are available to reimburse these costs.

II. How the Samples May be Used.

The WSP must analyze biological samples it receives from local governments unless a profile for the person in question is already in the system. The biological sample must be retained through the disposition of the underlying criminal case that caused the sample to be taken. The WSP may only place a searchable DNA profile in the DNA identification system after the person has been charged with a crime.

The WSP must retain the biological sample and the DNA profile if the person is convicted. However, the WSP must destroy the biological sample and delete the DNA profile if:

- the person is not charged within the applicable charging period;
- the accused has been found not guilty or has been acquitted of any offense that would require a biological sample to be collected; and
- the underlying conviction has been reversed and the case dismissed.

A person who prevails in a court action for misuse or unauthorized retention of a biological sample or DNA profile shall be awarded all costs, including reasonable attorney fees. In addition, the court must award a minimum of \$1,000 or \$10 for each day of the violation, whichever is greater.

Any misuse or unauthorized retention of a biological sample or DNA profile taken pursuant to arrest for a qualifying crime is an unranked class C felony. The term "misuse" is defined to mean any purpose other than to provide DNA or other tests for identification analysis and prosecution of a criminal offense, or for the identification of human remains or missing persons.

The WSP may send a searchable DNA profile to the Federal Bureau of Investigations for a one-time keyboard search, but may only be entered in the combined DNA index system (referred to as CODIS) after the accused has been found guilty and all right to appeal has lapsed, been waived, or been exhausted.

Substitute Bill Compared to Original Bill:

The number of crimes for which a biological sample must be collected is reduced. A biological sample must be collected upon arrest only if the arrestee is an adult, and only if the crime for which he or she was arrested is a most serious offense, any sex offenses, or one of the enumerated misdemeanors.

The duty to collect biological samples upon arrest is made contingent upon federal funding being provided to the state for that purpose. The funding sources under the original bill are eliminated. The provision allowing expanded use of funds in the state DNA Database Account is deleted.

The crime of misuse or unauthorized retention of a biological sample or DNA profile is created.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) We've all seen the TV shows and the newspaper headlines showing how DNA helps us to protect the innocent and catch the bad guys. This bill takes the next step in applying DNA technology to help catch individuals who have harmed people. The federal government and other states use DNA upon arrest. A Chicago study showed at least 60 violent crimes including 53 rapes and murders would have been avoided by using this technology. Anthony Dias would have been caught if this bill had been in statute a few years ago. The costs are high but the federal government has created \$150 million in grants to improve DNA technology. If we pass this bill we will save people we're responsible for.

Gathering DNA is a valuable tool for law enforcement to enable the compiling of evidence and to clear people who are suspected of crimes who didn't commit them. It is useful to obtain convictions and to exonerate the innocent. The bill's expansion to allow collection upon arrest will improve these functions. Law enforcement appreciates the timeframe for implementation in the bill to prepare for collection of DNA samples upon arrest, and the cost reimbursement element is an important part of the bill. This bill would not only help to solve crimes but to help prevent crime. Taking DNA upon arrest doesn't just mean we can solve

crimes, it means we can save lives. Absolving the innocent is a very important aspect as well.

(Opposed) Forensic DNA is indeed a valuable tool to solve cold cases and serious violent crimes. However, DNA collection is, constitutionally speaking, a "search," and this bill would likely be found unconstitutional as a violation of Article 1 section 7 of the Washington State Constitution as well as the 4th Amendment to the United States Constitution. The State Supreme Court recently upheld the statute requiring DNA collection from convicted felons as constitutional because the majority felt that convicted felons have diminished privacy rights, and the law contains a nexus to reduce recidivism. The Supreme Court found that these factors overcame the privacy protections of the State Constitution. The Legislature continues to expand the database, but this bill takes a quantum leap because it compels those who are merely arrested to submit to a search by the government. Accused persons still maintain their constitutional rights upon arrest, including their privacy rights. By encompassing all arrests, this bill loses the nexus between crimes that may be precursors to serious crimes down the line. This bill eviscerates the presumption of innocence which is a foundation of our criminal justice system and compels the government to search innocent people. This is over-reaching. This is different than fingerprints and mug shots and a DNA profile is not just a number in a database. Under the bill the biological sample is retained which includes the whole array of the citizen's genetic information. Citizens are expected to trust the government and the WSP Crime Lab with this information and trust that it won't be misused. There is real potential for an innocent person's DNA to be in the database and for that person to mistakenly be accused of a crime. This bill is one of the most, if not the most, far-reaching of its kind in the country. The bill requires collection from "lawful" arrestees, but the determination of whether or not the arrest is lawful is made by a judge later in the process, if it gets to a judge at all. The bill does not include procedures for the collection or the purging of samples if charges are not filed. It is apparent that there would be a significant fiscal impact and the backlog at the WSP Crime Lab would continue to grow exponentially. If there is a slippery slope, we're toward the bottom already. Under the rationale that we'll solve more violent crimes if we have more DNA, then we might as well collect it from everyone, and that's unacceptable.

When the DNA tool is used, any legislation must be carefully measured to protect privacy interests. This bill fails to adequately protect privacy because arrestees may never be charged, and this is a due process issue because arrestees have no opportunity to challenge the collection in court. This bill turns the fundamental tenant of "innocent until proven guilty" on its head. Currently, in cases where DNA upon arrest is warranted, police have an avenue to do this by obtaining a search warrant. That is the right balance to strike where the person has an opportunity to be heard. This is different from fingerprinting because there is so much information in DNA beyond identity. A sample on an individual also contains information on that person's relatives. The law authorizes retention of the sample, not just the identifying information contained in the profile. Expanding DNA collection costs money without expanding the effectiveness of the system. Adding more people who are of no interest to law enforcement will simply backlog the system. It is widely documented statistically that arrests skew along racial lines. Therefore taking DNA upon arrest will disproportionately fill the database with people of color and minorities.

Persons Testifying: (In support) Representative Miloscia, prime sponsor; Stan McCall, Federal Way Police Department; and Jayann Sepich.

(Opposed) Mark Prothero, Washington Association of Criminal Defense Lawyers and Washington Defender Association; and Shankar Narayan, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.